

No 3772

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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J. B. CASSERLY,

*Plaintiff in Error,*

vs.

REY B. WHEELER,

*Defendant in Error,*

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## PETITION FOR RE-HEARING ON BEHALF OF PLAINTIFF IN ERROR

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FILED

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U. S. DISTRICT COURT



No 3772

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. B. CASSERLY,

*Plaintiff in Error,*

vs.

REY B. WHEELER,

*Defendant in Error,*

*To The Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The Plaintiff in Error, the United States, respectfully petitions the United States Circuit Court of Appeals for the Ninth Circuit for a rehearing of the above entitled cause, following the judgment and opinion filed therein on August 7, 1922, whereby the judgment of the United States District Court for the Southern Division of the Northern District of California was affirmed. In that behalf the Plaintiff in Error respectfully asks and urges that further consideration should be given to that certain proposition of law upon which the judgment and opinion rests, to wit, that there is noth-

ing in the Selective Service Act or the regulations prescribed thereunder which can authorize the apprehension of a suspected delinquent by a draft board.

*A. The case is governed by the Selective Service Act and the Regulations framed thereunder.*

We invite the attention of the court particularly to the argument in our opening brief commencing on page 9 wherein we endeavored to show that under the provisions of the Selective Service Act it was within the power and therefore within the duty of a draft board to apprehend or direct a policeman to apprehend a suspected delinquent found within its district and this in advance of the institution of any criminal proceedings in the usual way. We recapitulate certain pertinent sections of the Act and regulations:

Section 49 of the Selective Service Regulations provides as follows: (Page 29, S. S. R. 999).

*Section 49. Duty of Police Officials of all Classes and Grades to assist Local Boards and to Apprehend Delinquents.*

Those who fail to return the Questionnaire, or to appear for physical examination, or to report change of status, or to report for any duty, *or to perform any act* at the time and place required by these regulations or by directions by Local or District Boards in pursuance thereof, are guilty of a misdemeanor under section 6 of the Selective Ser-

vice Law. Under authority granted in section 6 of that law, it is hereby made the duty of all police officials of the United States and of any State, or any county, municipality, or other subdivision thereof, to locate *and take into custody such persons and to bring them forthwith before the Local Boards to determine whether their cases shall be reported to the Federal Department of Justice for prosecution*, and to serve the summons to witnesses issued by Local or District Boards, as provided by section 9 hereof. \* \* \* \*\*

Section 130 of the Selective Service Regulations, page 99, provides:

*“Section 130. Registrants failing to return their Questionnaires or to report for physical examination to be reported to police authority.*

The names of persons who fail to return their Questionnaire or to report for physical examination when ordered to do so shall forthwith be sent to the local police authority (see sec. 1, par. (o)), with a request (Form 1012), Sec. 284, p. 232) immediately to visit, in person or through deputies, all such named persons *and to bring them before the Local Board*. Such names, with a statement of the delinquency of each, should, at the time they are reported to the police, also be reported to the press with a request for publication.

If the local police authority brings such persons before the Local Board, they shall be *treated as provided in section 135 hereof*.

If the local police authority is unable to produce such persons *within five days*, he shall immediately report to the Local Board all information he may have obtained concerning the delinquent registrants, or if he has no such information he shall report that fact.

Local Boards and police may request of postmasters the forwarding address of registrants in respect of whom mailed notices have not been returned as undeliverable. Should the postmaster refuse to give this information, the refusal should be reported to State headquarters, in order that it may be brought to the attention of the Provost Marshal General.

Section 135 of the Selective Service Regulations, page 69, provides:

*Section 135. Action by Local Board when delinquent not yet inducted into military service reports to it.*

When a delinquent reports or is transferred to or is *brought* by a *police officer* before a *Local Board* prior to his induction into military service the board shall, in all cases, require him to fill a **Q**uestionnaire. The board shall consider the excuse for his delinquency, and if it sees fit may extend time and proceed to a reclassification in the normal manner. If the Board finds no reasonable excuse for the delinquency, it may consider the failure to claim deferred classification as a waiver of the right to do so before either Local or District Board, both in their original jurisdiction or on appeal, and may refuse to extend time or reclassify the registrant.



If the delinquency was a failure to report for physical examination, the Local Board should in all cases proceed to physical examination.

Whether the delinquent is reclassified or not, whenever the *delinquency appears* to have been *willful*, the board shall *report the case to the nearest representative of the Federal Department of Justice.*

Where a delinquent has reported to the Local Board, pursuant to the orders of the Adjutant General of a State, the board shall, in all cases and on the same day, report the fact to the Adjutant General of the State (Form 1016), who shall at once, by an order in writing (Form 1017), rescind the order for the delinquent's induction into military service.

The form 1012 referred to in Section 130 appears at page 232 S. S. R. 99 A. According to the Regulations, the forms become an integral part thereof, and it appears that the form herein provided for is directed to local police authority, contains the direction that he immediately visit in person or thru deputies each person whose name appears on this list to locate such persons, if possible, *and bring them before this local board.* The form is to be signed not by the board but by a single member of the local board.

Having thus quoted certain pertinent paragraphs of the Regulations, significant portions being italicized, we are then brought to a consideration of the particular question involved in this

case: Is the seizure or apprehension of a suspected delinquent to be made in the first instance by the police authority on his own motion or upon the aforesaid direction of the draft board *without warrant* or *without* there first having been instituted a *criminal proceeding* charging the suspected delinquent with a misdemeanor? We have seen that one who evades the Act, commits a misdemeanor. He is called in the various portions of the act a "delinquent." If his dereliction occurs after his induction into the service he is called a "deserter." Such a "delinquent" commits a misdemeanor and of course can be prosecuted for the crime in the ordinary way. A complaint can be filed, a warrant issued and the alleged "delinquent" arrested as in case of any other crime. But is this criminal proceeding a *prerequisite* to the use of the above specified machinery in bringing a suspected "delinquent" before the local draft board for investigation? We submit that a candid consideration of the Act and these quoted provisions in particular can lead to but one conclusion to-wit: that the Act contemplates a *preliminary bringing before* the board and a preliminary investigation in advance of any criminal proceeding and thus in advance of any *warrant*.

If such a construction be conceded, of course it is no answer to say that the proceeding can only apply where the suspect is in fact a "delinquent." In other words, the contention would be that the draft board of the police authority would act upon



their peril in making the apprehension in any given case unless a criminal proceeding had first been instituted and a warrant issued. It is not to be considered that the Congress contemplated any such result. If the administrators of the Selective Service Act could have executed the foregoing sections of the Act only under the peril of being mulcted in damages if they in fact judged wrongfully, the provisions would have proven nugatory. Yet in practice, as we showed in our opening argument, the vast majority of the cases investigated resulted in the induction of the suspected "delinquent" into the service rather than the sending him to a criminal court for trial.

With due respect we submit that the Court has not given attention to this particular feature of the case, which is the real point that goes to the heart of the controversy. It is contended that the Plaintiff in Error did, or at least could have, under the facts, urged to the jury that he did, substantially the very thing contemplated by the Regulations, to wit, directed a police authority to bring a suspected delinquent before the board for consideration. And while it is true that ultimately Wheeler was discharged without a hearing before the board, it was owing to the fact that it was previously ascertained that a mistake had been made.

If we reach the conclusion that a police authority on his own motion could arrest a suspected delinquent or that a member of the draft board could

direct the arrest of a suspected delinquent in advance of the institution of a criminal proceeding, we come to the further question as to whether there were reasonable grounds for suspicion here, or reasonable grounds for the arrest. In considering this feature of the case the California case of Michel V. Smith, 63 Cal. D. p. 230, is very pertinent. This case was cited in the reply brief of Plaintiff in Error and seems to us to be very pertinent to a consideration of this feature of the case, altho the court did not refer to the authority in its opinion.

Accordingly it is earnestly and respectfully urged that the Court has failed to give due consideration to these quoted sections of the Selective Service Regulations and that a rehearing of this cause should be ~~ordered~~

**J. T. Williams**

**T. J. Sheridan**

**Attorneys for Plaintiff in Error**  
**CERTIFICATE OF COUNSEL**

I hereby certify that in my judgment the foregoing petition for rehearing is well-founded, and further, that it is not interposed for delay.

Dated: September 6, 1922.

**JOHN T. WILLIAMS,**

*United States Attorney,*

**T. J. SHERIDAN,**

*Asst. United States Attorney.*